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IN THE

Supreme Court of the United States

October Term, 1967

No. 795

ROBERT R. KAUFMAN,

Petitioner,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Appellate Division, First Department (hereinafter referred to as "the Appellate Division"), made and entered on May 4, 1967, denying petitioner's motion to vacate the Appellate Division's order of February 3, 1966, disbarring petitioner. On July 7, 1967, the Court of Appeals of the State of New York denied petitioner's motion for leave to appeal and dismissed his appeal as of right.

ARGUMENT

POINT I

Petitioner did not timely raise the claim underlying the petition for certiorari.

Petitioner was disbarred by order of the Appellate Division entered February 3, 1966. He first raised the contention upon which the petition for certiorari is predicated more than one year later, on March 10, 1967, when he submitted the motion to vacate the order of disbarment, review of the denial of which is here sought. Petitioner had previously neither objected to respondent's requests for information during the pendency of its investigation of the matters which subsequently resulted in formal charges against petitioner nor to the introduction in evidence during the course of the proceeding itself of the statements and documents which he had furnished.

Petitioner argues that his failure to raise the contention he now advances while the disciplinary proceeding was pending should be excused because of the reversal, following his disbarment, of *Cohen* v. *Hurley*, 366 U. S. 117, in *Spevack* v. *Klein*, 385 U. S. 511. He contends that this was a "supervening event" which entitled him to thereafter raise the constitutional question now urged which, prior to the *Spevack* decision, was untenable (Pet. pp. 10-11). We respectfully submit that the lack of merit upon which this contention is predicated is demonstrated by the petition for certiorari itself.

If, in fact, *Spevack* so substantially changed the law, it follows that petitioner could not rely upon any decisions prior to it since they, following petitioner's argument for excusing his failure to raise the constitutional question here presented while the disciplinary proceeding was pending, did not support him. Yet the petition relies upon a number of cases decided long before *Spevack*, principally *Boyd* v. *United States*, 116 U. S. 616, and the bill of attainder and ex post facto cases, *Ex parte Garland*, 4 Wall. 333 and *Cummings* v. *Missouri*, 4 Wall. 277. Petitioner also relies upon *United States* v. *Lovett*, 328 U. S. 303 and *United States* v. *Brown*, 381 U. S. 437. If, as petitioner urges, these cases support his present argument, he should have relied upon them in the course of the disciplinary proceeding and his failure to do so constitutes a waiver.

Moreover, *Spevack* could not have altered the prevailing law with respect to the contention advanced by petitioner since it was in no way there involved. In *Spevack*, this Court held that the institution of a disciplinary proceeding predicated upon an attorney's refusal to answer questions on the ground that he might thereby tend to incriminate himself in the conventional sense was a constitutionally prohibited form of compulsion. Petitioner here does not contend that he was deprived of his right not to incriminate himself in the conventional sense. He contends that a disciplinary proceeding is a "criminal case" within the meaning of the Fifth Amendment and that he should have had the right to refuse to furnish answers which might tend to subject him to discipline. Thus, petitioner himself distinguishes the *Spevack* case from the contention he is advancing here (Pet. pp. 7-8). It follows, therefore, that *Spevack* cannot justify the untimely submission of the argument now advanced by petitioner.

POINT II

The decisions of this Court in *Spevack* v. *Klein* and related cases do not warrant retroactive application.

Even if *Spevack* and the cases which followed it upon which petitioner relies supported his present contention, they would appear to be unavailable to him. Petitioner was disbarred by order entered February 3, 1966. The decision in *Spevack* was announced on January 16, 1967. In order, therefore, for petitioner to avail himself of that decision and those that followed it, *Spevack* must be given retroactive application.

This Court gave no indication in deciding *Spevack* whether it would be applied retroactively. However, recent opinions with respect to the issue of retroactivity strongly suggest that decisions involving interpretations of the constitutional privilege against self-incrimination, such as *Spevack*, will be given prospective effect only. Thus, retroactivity was denied to the doctrine of *Griffin* v. *California*, 380 U. S. 609, forbidding adverse comment upon a defendant's failure to testify in a state criminal trial, in *Tehan* v. *Shott*, 383 U. S. 406. Similarly, retroactivity was denied to the doctrines promulgated in *Escobedo* v. *Illinois*, 378 U. S. 478 and *Miranda* v. *Arizona*, 384 U. S. 436, in *Johnson* v. *New Jersey*, 384 U. S. 719.

In the latter case, this Court noted, 384 U. S. at 727-8, that constitutional rules announced by it would be applied retroactively if they concerned evidence of doubtful reliability and relevancy, affecting the very integrity of the fact-finding process, with the result that retroactivity averted the danger of convicting the innocent. Since there

is no basis for concluding that testimony improperly compelled by the threat of disbarment is either inaccurate or unreliable, it would appear that the *Spevack* decision is to be given prospective effect only and is not applicable to cases, such as that of petitioner here, concluded prior to the announcement of that decision.

The implications of affording petitioner a retroactive application of the *Spevack* decision are far-reaching.

Petitioner neither objected nor invoked his privilege against self-incrimination either when asked for a statement of his position concerning the complaints made against him or when such statements were introduced in evidence. Each of the statements furnished by petitioner concerning the complaints against him, with the exception of that involving his issuance of worthless checks, were exculpatory, denying that he had been guilty of the wrongdoing alleged. The charges predicated upon petitioner's issuance of worthless checks were supported by subpoenaed transcripts of the bank accounts in question, the identity of at least most of which were disclosed to respondent, not by petitioner, but by individuals who had been the recipients of such checks. Each of the remaining charges sustained by the court below was supported by witnesses produced by respondent. If, in these circumstances, *Spevack* is made retroactively available to petitioner, it must follow that it is equally available to reverse every proceeding in which discipline was imposed where the attorney was interviewed in the course of the preliminary investigation and/or testified in the course of the proceeding, prior to January 16, 1967, when the decision in *Spevack* was announced. Disbarred attorneys, who would be entitled to reinstatement merely by contending that they would have

invoked their privilege against self-incrimination had the prevailing law made it available to them, would in many instances be immunized from further proceedings because the passage of time has made unavailable evidence which could have been readily marshalled at the time of the proceeding against them. We respectfully submit that the interests of justice would not be well served by such a result.

POINT III

A disciplinary proceeding is not a criminal case within the meaning of the Fifth Amendment.

In an effort to overcome the clear wording of the constitutional provision, petitioner argues that recent decisions of this Court "intimate" that the term "in any criminal case" as used in the Fifth Amendment has been expanded to include disciplinary proceedings. We respectfully submit that nothing contained in any decision of this Court warrants such a conclusion.

The principal cases relied upon by petitioner are *Spevack* v. *Klein*, 385 U. S. 511; *Kaye* v. *Co-ordinating Committee*, 386 U. S. 17; and *Zuckerman* v. *Greason*, 386 U. S. 15. In each of those cases, the attorney was subject to criminal prosecution in the conventional sense and refused to answer on the ground that to do so might tend to incriminate him. This Court held that the action of the state court in each of those cases predicated upon this invocation of the privilege against self-incrimination constituted an improper form of compulsion forcing the attorney to relinquish his constitutional privilege not to incriminate himself "in any criminal case". Thus, *Spevack* struck down the attorney's disbarment for failing to cooperate with the court having

jurisdiction over his license where his refusal to answer was predicated upon the constitutional privilege. *Kaye* reversed the attorney's disbarment which, as indicated in the state court's opinion, was in part predicated upon an adverse presumption based upon the attorney's refusal to testify on the grounds that to do so would tend to incriminate him. *Zuckerman* reversed and remanded the disbarment of one attorney and the suspension of another where the distinction in the discipline imposed was apparently predicated upon the disbarred attorney's failure to answer on the ground that to do so would tend to incriminate him. The distinction between these cases and his own position is conceded by petitioner (Pet. p. 7).

Both *Kaye* and *Zuckerman* were predicated upon the *Spevack* decision. Examination of the majority, concurring and dissenting opinions in that case discloses no "intimation" that the Court was inclined to expand the scope of the privilege against self-incrimination to include disciplinary proceedings.

The majority opinion in *Spevack* indicates that the Court, rather than expand the scope of the privilege which would have immediately resolved the issued there posed, found the act of the State, disbarment, to be an improper form of compulsion forcing the attorney to relinquish his constitutional privilege not to incriminate himself in the conventional sense. Thus, Mr. Justice Douglas, writing for the majority, stated:

> "The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood, are powerful forms of compulsion to make a lawyer relinquish the privilege."

It follows, therefore, that this Court reversed the disbarment in *Spevack*, not because the attorney there involved had the right to refuse to answer questions which might tend to subject him to discipline (such questions being outside the scope of the privilege), but because disbarment was an improper penalty for the attorney's exercise of his constitutional right not to answer questions which might tend to incriminate him, he still being subject to criminal prosecution in the conventional sense.

The fact that this Court's decision in *Spevack* turned upon a finding of improper compulsion rather than expansion of the scope of the privilege against self-incrimination appears from the related case, decided the same day, of *Garrity* v. *New Jersey*, 385 U. S. 493. There the Court prohibited the use by the prosecution at a criminal trial of testimony compelled by threat of loss of job upon refusal to answer for any reason. The Court concluded that the testimony elicited and sought to be used in support of criminal charges against the defendants had been improperly compelled. Thus, the Court, again speaking through Mr. Justice Douglas, stated:

> "The choice given appellants was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent . . ."

It was precisely because this Court did not expand the scope of the privilege but concerned itself with a determination of conduct by the State which constituted improper compulsion directed toward an individual to force him to waive his existing privilege against self-incrimina-

tion in the conventional sense, that Mr. Justice Fortas concurred in the *Spevack* decision while pointing out that, in his judgment, a public employee who refused to answer questions directly related to the performance of his official duties could be discharged even though his refusal was predicated upon the invocation of the privilege against self-incrimination. This expression by Mr. Justice Fortas, whose vote was essential to the majority in *Spevack*, is inconsistent with petitioner's assertion that the scope of the privilege must be interpreted to encompass any governmental act which in any sense "punishes" or affects the individual adversely and, specifically, disqualification from employment (Pet. p. 7).

The dissenting opinion of Mr. Justice White further indicates that the Court itself considered *Spevack* to be a "compulsion" case and not one expanding the scope of the privilege. Thus, he dissented upon the ground that the attorney in *Spevack* could not give any statements which would tend to incriminate him since, if they were furnished under the compulsion of threat of disciplinary action if he refused, *Garrity* prohibited their use against him in any subsequent criminal prosecution. As in the case of the concurring opinion of Mr. Justice Fortas, this dissenting view is inconsistent with the interpretation advanced by petitioner that the majority opinion in *Spevack* "intimates" that the attorney had the right to refuse to answer questions because they might tend to subject him to discipline.

In addition to relying upon decisions of this Court which were announced after his disbarment, petitioner also advances contentions predicated upon prior decisions of this Court, principally *Boyd* v. *United States*, 116 U. S. 616. Such claims, in addition to being untimely, find no support

in the opinions relied upon. Thus, *Boyd* and subsequent decisions of this Court which follow it, are distinguishable. As the Court noted in *Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693, 701, the *Boyd* situation required a determination that the criminal law had been violated, the forfeiture there sought being authorized as an alternative to imprisonment and/or fine in the same statute. Consequently, if the claimant there were compelled to give testimony, he would be asked to provide evidence to establish a violation of what this Court concluded was essentially a criminal statute, i.e. to incriminate himself.

Petitioner also relies upon prior decisions of this Court involving the constitutional prohibitions against bills of attainder and ex post facto laws. There is no rational basis for concluding that the standards applicable to legislative enactments must necessarily be equated to the term "in any criminal case" limiting the applicability of the privilege against self-incrimination. This is particularly true since such an interpretation would render the term meaningless.

This Court has held that disciplinary proceedings are civil rather than criminal in nature, *Ex Parte Wall*, 108 U. S. 265, 288. Its rules concerning the discipline of attorneys admitted to its bar have been predicated upon that assumption. Thus, where it is shown to this Court that any member of its bar has been guilty of misconduct, he is forthwith suspended from practice and thereupon offered the opportunity to show good cause why he should not be disbarred (Revised Rule 8). Contrary to the procedure applicable to criminal cases, the "accused" is thereby required to come forward to explain his conduct.

There are sound policy considerations which dictate against permitting an attorney to refuse to answer questions which might tend to subject him to discipline as distinguished from criminal prosecution in the conventional sense. To recognize such a right on the part of an attorney is to recognize his right not to account to his client or to the court of which he is an officer. The right to counsel is one of the most precious in our democracy. This Court has taken great pains in recent decisions to afford that right to all, to the accused, the indigent and most recently to juveniles. That right, upon which individual liberty literally depends, is reduced to a hollow mockery if the attorney is no longer answerable to the client whose only resort, if the integrity of his counsel is questioned, is to seek independent evidence of impropriety because the Fifth Amendment has been held to immunize the attorney from any duty to answer inquiries concerning his conduct.

The integrity of the administration of justice is similarly undermined if courts are powerless to inquire into the integrity of members of their bar and are relegated to engage in a quest for independent evidence when the propriety of an attorney's conduct is called into question. The everyday function of our courts is dependent upon the integrity of the attorneys who practice before them. Ex parte applications, the institution of suits, and the issuance of subpoenas, are only a few examples of the powers granted attorneys in reliance upon their integrity which can cause untold damage if abused. To prohibit courts from holding attorneys directly responsible for their conduct and to require independent inquiry would not only interfere with the expeditious disposition of those responsibilities which already overburden our courts but would also destroy the very integrity of the relationship between bar and bench

which makes the administration of justice operable. We respectfully submit that the Fifth Amendment should not be so interpreted as to require, for instance, that a court conduct an independent inquiry before it can remove a trustee appointed by it who refuses to account on the ground that to do so would tend to subject him to discipline.

Further policy considerations mitigate against expanding the scope of the Fifth Amendment to include disciplinary proceedings. Unfortunately, attorneys are sometimes the means through which public officials are corrupted. Such transactions are usually conducted in private so that there are no witnesses present. Consequently, the public official can usually be prosecuted and removed only by granting the attorney immunity from criminal prosecution in the conventional sense and thereby eliciting his testimony concerning the bribe. If the Fifth Amendment is interpreted to give the attorney the right not only not to incriminate himself in the conventional sense but also not to subject himself to discipline, his testimony concerning the bribe can only be elicited by giving him immunity both from criminal prosecution and from discipline. Thus, the attorney's very confession of his guilt would immunize him from removal as a member of the bar. He would thereafter have to continue to be certified as an attorney in good standing by all the courts to which he was admitted and could even continue to practice before the very agency he had corrupted.

We respectfully submit that neither the Fifth Amendment nor any decisions of this Court justify such results.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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